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In The

Supreme Court of the United States

October Term, 1998

TERRY MORGAN

Petitioner,

vs.

THE COUNTY OF LAKE, AND THE SUPERIOR COURT IN AND FOR THE COUNTY OF LAKE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit's Rule designating certain decisions as "non-citable" and "non-precedential" violate the due process and/or equal protection clauses of the United States Constitution?

2. Does the Ninth Circuit apply its non-publication/non-citation Rule in an arbitrary and capricious manner such that the Rule, as applied, violates the due process and/or equal protection clauses of the United States Constitution?[1]

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[1] All parties to the Ninth Circuit proceedings are listed in the caption. There are no corporate parties.

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I.

CITATION TO OPINIONS BELOW

The Memorandum decision of the Ninth Circuit Court of Appeals is printed in Appendix "A", *infra*, and is not officially reported. (App. 1-3.) The Ninth Circuit's Order denying Appellant Morgan's Petition for Rehearing and Suggestion for Rehearing En Banc appears in Appendix "B", *infra*. (App. 4-5.) The Ninth Circuit's rejection of Morgan's publication request is set forth in a letter from Cathy A. Catterson, Clerk of Court, dated February 10, 1999, and appears in Appendix "C", *infra*. (App. 6.)

II.

JURISDICTION

The Ninth Circuit's decision was issued on December 4, 1998. (App. 1.) Morgan's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 13, 1999. (App. 4.) This petition for certiorari was filed within ninety days of that date and invokes this Court's Jurisdiction under 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal statute implicated is 28 U.S.C. § 2071 which authorizes the courts of appeal to adopt local rules of practice. Pursuant to § 2071 and Rule 47 of the Federal Rules of Appellate Procedure, the Ninth Circuit has adopted Circuit Rule 36 which provides, *inter alia*, as follows:

Circuit Rule 36-1: Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Circuit Rule 36-2: Criteria For Publication

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Circuit Rule 36-3: Other Dispositions

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Circuit Rule 36-4: Request For Publication

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of issuance of this Court's disposition. . . . If such a request is granted, the unpublished disposition will be redesignated an opinion.

* * *

The Constitutional provisions implicated are the due process clauses contained in Fifth and Fourteenth Amendments and the equal protection clause, also contained in the Fourteenth Amendment.

The Fifth Amendment provides *inter alia:*

"No person shall be . . . deprived of life, liberty, or property without due process of law. . . . "

Section 1 of the Fourteenth Amendment provides *inter alia:*

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

IV.

STATEMENT OF THE CASE[2]

Petitioner Terry Morgan ("Morgan") worked as a *pro tem* court reporter for the Lake County Superior Court in 1993 under the supervision of Lee Poole ("Poole"), the Chief Court Reporter. On August 23, 1994, Morgan filed a complaint in the U.S. District Court for the Northern District of California naming the County of Lake ("County"), the Superior Court for the County of Lake ("Superior Court"), and Poole as defendants. Morgan's

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[2] This statement is based on the undisputed procedural record.

Complaint set forth ten causes of action alleging claims of sexual harassment, retaliation, and various state torts and invoked the District Court's jurisdiction under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*).

While Morgan's Complaint was pending, Poole and his wife filed a state complaint naming Morgan as a defendant, among others. The "Poole Complaint" was removed to the District Court as a compulsory counter-claim under Rule 13(a) of the Federal Rules of Civil Procedure ("FRCP") over which the District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The Poole Complaint was then "related" to the Morgan Complaint and consolidated for case management purposes.

Pursuant to California law, Morgan demanded that the County and the Superior Court defend her and hold her harmless with respect to the Pooles' claims. The County and the Superior Court rejected Morgan's demand on the basis that Morgan was an independent contractor and, therefore, was not entitled to either a defense or to indemnification.

Morgan retained separate counsel and filed a FRCP 13(g) cross-claim seeking indemnity under California Government Code § 995 and California Labor Code § 2802. Morgan, *as a cross-claimant*, then moved for summary judgment seeking to have the District Court determine that she was an employee. At the same time, the County and Superior Court moved for summary judgment to have the Court determine that Morgan was an independent contractor with respect to Morgan's employee-based *plaintiff* claims as well as her cross-claim.

The District Court granted the County and Superior Court's motion holding Morgan to be an independent contractor and dismissed her cross-claim and her employee-based causes of action. Morgan was allowed to proceed to trial on her non-employee based claims *contained in the complaint that she had originally filed.* However, prior to trial, the District Court entered a separate judgment with respect to the Poole Complaint which judgment Morgan appealed to the Ninth Circuit.[3]

The only issue before the Ninth Circuit was whether Morgan had established the existence of a factual dispute regarding her employee status such that the District Court was precluded from finding, as a matter of law, that she was an independent contractor. Morgan's brief cited twenty-one (21) facts which could lead a fact-finder to conclude that the County and Superior Court had the right to control the means and manner by which Morgan performed her duties – the test for employee status under California law.[4]

Nonetheless, on December 4, 1998, the Ninth Circuit issued a 2 and 1/4 page decision affirming the grant of

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[3] Morgan's substantive claims were ultimately tried to a jury in November 1997 and are now on appeal to the Ninth Circuit. On appeal, Morgan again raises the issue of whether the District Court correctly held that she was an independent contractor. Thus, the only individual who is potentially affected by the Ninth Circuit's unpublished decision is Morgan because Ninth Circuit Rule 36-3 allows citation of an unpublished decision where the doctrine of res judicata or collateral estoppel *may be* relevant.

[4] *Tieberg v. Unemployment Insurance Appeals Board*, 2 Cal. 3d 943, 950 (1970).

summary judgment. (App. 1-3.) The circuit panel designated its disposition as a Memorandum decision which, under Circuit Rule 36-3, can neither be published nor cited as precedent. The Ninth Circuit did not discuss, no less distinguish, the California cases cited by Morgan, and the panel's entire legal analysis is contained in the following three sentences:

> "The fact that Morgan did not receive standard employment benefits from the County indicates that she was not intended to receive the benefits of indemnification. Moreover, the intent of the County and Morgan was to create an independent contractor relationship. At the time of the underlying incident, Morgan and the County understood the relationship to be that of an independent contractor." (App. 2-3.)

Because neither the failure to pay appropriate employee benefits nor the parties' subjective belief is determinative under California law as to whether an employer retains the requisite "right to control",[5] Morgan petitioned the Ninth Circuit for rehearing. Alternatively, Morgan argued that the panel's designation of its disposition as an unpublished Memorandum decision constituted a denial of due process and equal protection and requested that the Court either publish the decision or

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[5] *S. G. Borello & Sons v. Dept of Industrial Relations*, 48 Cal. 3d 341, 349 (1988) ("The labels placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced."); and *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 220 Cal. App. 3d 864, 877 (1990) ("These [failures to make tax withholdings from an individual's paycheck] are merely the legal consequences of an independent contractor status not a means of proving it.")

address the constitutionality of its non-publication rule and practice.

The Ninth Circuit denied the Petition for Rehearing and the Suggestion for Rehearing En Banc without comment. (App. 4.) Thereafter, pursuant to Circuit Rule 36-4, Morgan wrote a letter to the Clerk of Court requesting that the panel designate its Memorandum decision as a publishable Opinion on the grounds that the Memorandum decision qualified for publication under Circuit Rule 36-2 because (1) the decision altered or modified long-standing universal precedent and (2) concerned a legal and factual issue of substantial public importance. In addition to incorporating the arguments contained in her Petition for Rehearing, Morgan asserted that the failure to publish the Memorandum decision constituted an arbitrary and capricious application of the Circuit's Local Rule and therefore violated the due process and equal protection clauses of the Constitution. By letter dated February 10, 1999, the Clerk advised that the panel "did not wish to publish the decision". (App. 6.)

V.

REASONS FOR GRANTING THE WRIT

A. UNPUBLISHED, AND OFTENTIMES UNCITABLE, APPELLATE DECISIONS ARE NOW THE NORM, RATHER THAN THE EXCEPTION.

Until the early 1960s, almost all federal appellate decisions were published and constituted citable precedent. However, over the past 40 years, primarily as a result of a 1964 Judicial Conference suggestion, all of the courts of appeal have adopted local rules under which

decisions are designated as "not for publication". *See generally* Dragich, *Will The Federal Courts Of Appeal Perish If They Publish? Or Does The Declining Use Of Opinions To Explain And Justify Judicial Decisions Pose A Greater Threat,* 44 Am. U. L. Rev. 757, 760-762 (1995). What started out as non-controversial procedure, anticipated to be limited to cases of no legal significance, has grown like Topsy. The result is a growing body of "secret law" as this practice – commonly called "selective publication" – has come to dominate federal appellate decision making.

The most recent statistics are startling. As the following table shows, on average almost 75% of all federal appellate decisions are now designated as "not for publication" with the Seventh Circuit publishing the most decisions (slightly more than 50%) and the Fourth Circuit publishing the fewest (less than 10%).

U.S. Court of Appeals – Types of Opinions Or Orders Filed in Cases Terminated On The Merits During The Twelve Month Period Ended September 30, 1998[6]

Circuit	Total Cases	Published	Unpublished	Percent Unpublished
All	*24,828*	*6,247*	*18,581*	*74.6%*
D.C.	633	274	359	56.7%
First	740	370	370	50.0%
Second	1,721	514	1,207	70.1%
Third	1,740	254	1,486	85.4%
Fourth	2,569	242	2,327	90.6%
Fifth	3,552	1,030	2,522	71.0%
Sixth	1,861	399	1,462	78.6%
Seventh	1,415	716	699	49.4%
Eighth	1,856	778	1,078	58.1%
Ninth	4,337	710	3,627	83.6%
Tenth	1,576	436	1,140	72.3%
Eleventh	2,828	524	2,304	81.5%

The Ninth Circuit, as well as the First, Second, and Seventh Circuits, designate, by local rule, their non-published decisions as "non-precedential", and litigants are barred from citing these decisions.[7] The remaining circuits, although "disfavoring" citation of their non-published decisions, permit it; however, the Fifth, Eighth, Tenth, and Eleventh Circuits still classify such decisions

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[6] This statistical data is excerpted from Table S-3 of the Judicial Business of the U.S. Courts, *Annual Report of the Director, 1998*. Excluded from this excerpt are the 82 oral decisions issued by the Sixth Circuit which Table S-3 includes as unpublished decisions.

[7] First Circuit Local Rule 36.1; Second Circuit Local Rule .23; and Seventh Circuit Local Rule 53.

as "non-precedential" while the Third, Fourth, and Sixth Circuits acknowledge, either explicitly or implicitly, the precedential worth of their unpublished decisions.[8]

B. SELECTIVE PUBLICATION HAS CREATED AN UNAUTHORIZED AND UNAPPROVED BODY OF SECRET LAW.

Selective publication has *never been authorized by Congress nor approved by this Court* although, as discussed *infra*, the related practice of vacatur was severely limited by this Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386 (1994). However, this growing body of "secret law" has not gone unnoticed by members of this Court. Justice Stevens, in dissenting from a summary disposition in *County of Los Angeles v. Kling*, 474 U.S. 936, 938, 106 S.Ct. 300, 301 (1985) described the practice of selective publication as "plainly wrong" stating:

> "As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by the case did not warrant discussion in a published opinion that could be 'cited to or by the courts of this circuit, save as provided by Rule 21(c).' [citation omitted] That decision not to publish the opinion or permit it

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[8] Third Circuit Local Rule IOP 5.1-5.8; Fourth Circuit Local Rule 36(c); Fifth Circuit Local Rule 47.5; Sixth Circuit Local Rule 24; Eighth Circuit Local Rule 28A; Tenth Circuit Local Rule 36.3; and Eleventh Circuit Local Rule 36-2.

> to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong."
>
> (footnote otmitted.)

Similarly, selective publication has received nearly unanimous condemnation from the academic community which has called for its repeal as flawed in concept and implementation. *E.g.*, Richman & Reynolds, *Elitism, Expediency, And The New Certiorari: Requiem For The Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996).

C. THE NINTH CIRCUIT VIOLATES THE CONSTITUTION IN CREATING, BY LOCAL RULE, A BODY OF SECRET, NON-CITABLE LAW.

Ninth Circuit Rule 36-1 provides that certain decisions will not be published while accompanying Circuit Rule 36-3 precludes use of these non-published decisions as precedent and bars their citation. This rule has led to a body of "secret law" applicable to the vast majority of litigants who are unfortunate enough to be consigned to the unpublished opinion category. Indeed, there is objective evidence that this body of "secret law" conflicts with published decisions issued by the circuit or is in conflict with other, unpublished decisions. *See* Carrington, et al., *Justice On Appeal*, p. 38 (1976) (discussing conflicts within Ninth Circuit that are only detectable with aid of unpublished decisions); and Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

The Ninth Circuit's rule, and the development of "secret law", is *in direct conflict* with a decision issued by

the Fourth Circuit. In *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) the Fourth Circuit held that it could not bar citation of unpublished decisions, stating: "We concede, of course, that *any decision is by definition precedent*, and that *we cannot bar the right* to urge upon us what we have previously done." (emphasis added.)

Similarly, the Third and Sixth Circuits implicitly acknowledge the precedential value of their unpublished decisions by authorizing their citation where "counsel believes . . . that an unpublished decision has precedential value in relation to a material issue in a case . . . " (*E.g.*, Sixth Circuit Local Rule 24(c).) Thus, the Fourth Circuit, by decision, and the Third and Sixth Circuits, by rule, stand together *and in conflict with their sister circuits* in holding that unpublished decisions constitute *citable precedent*.

The Tenth Circuit's treatment of this issue is instructive on the perils of selective publication. In *Re Rules of the United States Court Of Appeals For the Tenth Circuit*, 955 F.2d 36 (10th Cir. 1992), the Tenth Circuit adopted, without comment, a non-precedent, non-citation rule over Chief Judge Holloway's dissent. Chief Judge Holloway, joined by Judges Barrett and Baldcock, rejected the proposition that a circuit court had the constitutional authority to designate decisions as non-precedential and bar their citation, stating.

> " . . . Each ruling, published or unpublished, involves the facts of a particular case and the application of law to the case. Therefore, all rulings of this court are precedents, like it or not, and we cannot consign any of them to

> oblivion by merely banning their citation. [citing *Jones v. Superintendent*] No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. *To deny a litigant this right may well have overtones of constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule."*
>
> (emphasis added and footnote deleted.) 955 F.2d at 37.

The Tenth Circuit has evidently conceded, at least in part, the correctness of Chief Judge Holloway's dissent because the circuit's *current* local rule allows the citation of non-published decisions where of "persuasive value" despite still considering such decisions to be "non-precedential" – a position shared by the Fifth, Eighth, and Eleventh Circuits. (Tenth Circuit Local Rule 36.3.)

A fundamental requirement of justice is that like cases be decided alike – this is the basic precept of the doctrine of *stare decisis*. As noted by Justice Douglas: "[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. . . . *Stare decisis* serves to take the capricious element out of law and to give stability to a society." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949); and *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543, 82 S.Ct. 1459, 1469 (1944). Consistency is the touchstone of fair and impartial decision making. *See generally* Dragich, *supra*, 44 Am. U. L. Rev. at 780.

The Ninth Circuit's Rule is a direct affront to *stare decisis*. The very fact that unpublished decisions cannot be cited guarantees that inequality will occur. Selective publication, by ensuring that the circuit will remain ignorant of its own past decisions, breeds inequality. *Id.* at 786-787. Inconsistencies necessarily arise because present panels have no knowledge of past panels' decisions. The treatment of Morgan's appeal is just the latest example of this unequal and inconsistent two-track system of appellate justice. If the Ninth Circuit allowed the *Morgan* decision to be cited as precedent, it could not hold, as it did, that Morgan was an independent contractor based on factors – the manner in which she was paid and her subjective belief – that the California courts have repeatedly held to be irrelevant or of secondary importance in determining employee status.

As all but the First, Second, Seventh, and Ninth Circuits recognize, judicial decisions have a "public component", and the courts of appeal simply do not possess the constitutional authority to hide their decisions through the expedient mechanism of selective publication. Indeed, the only difference between the appellate court practice of selective publication and the now *disapproved* and related practice of vacatur is that appellate judges rather than litigants make the decision as to what decisions constitute citable precedent.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra,* this Court severely limited the practice of vacatur whereby parties erase precedent by stipulated agreement. In *Bonner Mall,* this Court held that vacatur was only appropriate in "exceptional circumstances" and never simply because the parties were in agreement.

Quoting from Justice Stevens' dissent in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40, 114 S.Ct. 425, 428 (1993), this Court acknowledged the existence of a "public interest" in judicial decisions stating: "[Judicial precedents] are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra,* 513 U.S. at 26, 115 S.Ct. at 392.

The creation of non-citable law – whether by litigants through vacatur or by judges through selective publication – ignores the public and constitutional interest in the creation of a coherent and consistent body of law. *See generally* Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication, And Vacatur,* 30 Harv. C.R.-C.L. Rev. 109 (1995). If the practice of vacatur is suspect, selective publication is equally suspect and demands review by this Court.

The Fourth Circuit stands alone in *expressly acknowledging* that it lacks the authority to create secret, non-citable, non-precedential law. Additionally, the Third, Fourth, and Sixth Circuits are in conflict with their sister circuits in treating all of their decisions as citable precedent. Accordingly, this Court should grant certiorari to resolve this inter-circuit conflict and to decide this critical issue which has had such an important and far-reaching effect on appellate litigants and the development of law in the United States.

D. THE NINTH CIRCUIT'S RULE ESTABLISHING CRITERIA FOR THE PUBLICATION OF DECISIONS PROVIDES NO EFFECTIVE OR MEANINGFUL RESTRAINT ON THE CIRCUIT'S DISCRETION, AND THEREFORE LEADS TO ARBITRARY AND CAPRICIOUS IMPLEMENTATION.

Assuming *arguendo* that the Ninth Circuit has the right to selectively publish decisions, the Circuit's rules are being applied in a capricious and arbitrary manner, and indeed, by their very nature, result in arbitrariness. Thus, this Court is compelled to consider the validity of the rules as drafted and applied.

Under Circuit Rule 36-2, the Ninth Circuit is obligated to publish any decision which meets its specified criteria. Yet, it is clear that the Ninth Circuit often ignores its own criteria and chooses to designate a decision as "not for publication" based on other, unspecified criteria.

The case of Petitioner Morgan presents a classic example. By holding that Morgan was an independent contractor based on the manner in which Morgan was paid and based on Morgan's subjective belief regarding her employee status, the Ninth Circuit was "establishing, altering, modifying, or clarifying" an existing rule of California law such that publication was mandated under Rule 36-2(a). As noted *supra* n. 5, the California courts have rejected these factors as dispositive evidence of employee status. Clearly, therefore, publication was required. The fact that the opinion issued provides little analysis is irrelevant. Nothing in Circuit Rule 36 authorizes the Circuit to reject publication based on the breadth of the analysis.

Alternatively, publication was mandated under Rule 36-2(d) because the decision involves a legal issue of substantial public interest. The distinction between "employee" status and "independent contractor" status is receiving considerable attention and judicial scrutiny in today's economy where more and more employers seek to classify individuals as independent contractors – a fact recognized by the Ninth Circuit in its own recent *en banc* decision on the subject, *Vizcaino v. Microsoft Corporation*, 120 F.3d 1007 (9th Cir. 1997), *cert. den.*, 118 S.Ct. 899 (1997).

Morgan's case is not an isolated example. The statistics alone are sufficient to demonstrate that the Ninth Circuit fails to follow its own specified publication criteria. It is impossible to believe that over 80% of the Ninth Circuit's decisions are based on the application of settled principles – especially where these unpublished decisions involve a significant number of cases where a district judge is reversed. *See* Dragich, *supra*, 44 Am. U. L. Rev. at 798-799.

One study demonstrated that *one in every seven* unpublished federal appellate decisions reversed the lower court. Reynolds & Reichman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 Chi. L. Rev. 573, 617-618 n. 53 (1981). Another study showed that over 50% of Ninth Circuit reversals of Board of Immigration Appeal decisions were unpublished. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 Mich. L. Rev. 940, 946-947 n. 33 (1989). It is inconceivable that district judges are so inept or inexperienced that they are failing

to apply settled legal principles in nearly 15% of their cases or that any appellate reversal would be of no legal significance. Indeed, some circuits, unlike the Ninth Circuit, explicitly recognize that "reversals" are legally significant and, therefore, normally require the publication of decisions in which a reversal occurs. (*E.g.*, Seventh Circuit Local Rule 53(c)(1)(v).)

Examples abound where a circuit's non-publication decision is nothing less than astonishing and clearly contrary to the circuit's specified publication criteria. For instance, in *Johnson v. Knable*, 1988 WL 119136 (4th Cir. 1988) the court held that if prison officials had denied a homosexual prisoner a job because of his sexual orientation, they may have violated the prisoner's equal protection rights. As the first case to hold that homosexuality might constitute a "suspect classification", *Johnson* was ground-breaking and, under the Fourth Circuit's criteria, should have qualified for publication. (Fourth Circuit Rule 36.4.)

This Court has even had occasion to note its astonishment at a circuit's nonpublication decision. In *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696 (1993) the Sixth Circuit, in an unpublished decision, held that a federal statute prohibiting the broadcasting of lottery advertisements was unconstitutional. In reversing, this Court observed: "We deem it remarkable and unusual that although the Court of Appeal affirmed a judgment that an Act of Congress was unconstitutional, as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." 509 U.S. at 425 n. 3. *See also Board of Education v. Rowley*, 458 U.S. 176, 102

S.Ct. 3034 (1982) (reversing in an extensive opinion an uncitable decision of the Second Circuit).

Quite frankly, this Court's stated belief that such non-publication practices are "unusual" is unwarranted. In *National Classification Committee v. United States*, 765 F.2d 164 (D.C. Cir. 1985), Judge Wald wrote a "separate statement" to set forth her disagreement with the panel's prior non-publication order and criticized the practice of selective publication as "overused". Judge Wald noted that a committee impaneled to review the unpublished decisions issued by the D.C. Circuit had concluded that "40 percent of the decisions arguably *should have been published under the court's governing criteria.*" *Id.* at 173 (emphasis added).

The end result is that the courts of appeals have ceased to function in their historic role as "error correctors" and have transformed themselves into certiorari courts, or in the words of Dean Carrington, into "junior Supreme Courts." Richman & Reynolds, *supra*, 81 Cornell L. Rev. at 293. The circuit courts have accomplished this transformation by implementing rules which they themselves do not follow – as at least one D.C. Circuit judge has been forthright enough to admit. As a result, it is clearly impossible to predict what decisions will or will not be published because the publication rules are being applied in an arbitrary and capricious manner.

As implemented by the Ninth Circuit, selective publication is essentially a lawless exercise without any restraint on the circuit's discretion to designate a decision as "not for publication". The consequence is that the appeals of individuals, such as Morgan, receive little or

no real consideration because the circuit has the unfettered discretion to bury any decision in the trash heap of "not for publication". The solution for the federal appellate case load lies in structural change; not lawlessness. *See generally* Dragich, *Once A Century: Time For A Structural Overhaul Of The Federal Courts*, 1996 Wis. L. Rev. 11. Accordingly, it is incumbent on this Court to grant certiorari to ensure that the circuits act in a lawful manner in making such an important decision.

VI.

CONCLUSION

WHEREFORE, for the aforesaid reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE P. POOLE; YOLANDA A. POOLE, Plaintiffs-Appellees, v. CARRIE TRITCHLER; KATHY WEHINGER, Defendants-Appellees, v. LAKE COUNTY; LAKE SUPERIOR COURT, Defendants-cross-defendants-Appellees, v. TERRY MORGAN, Defendant-cross-claimant-Appellant.	No. 97-16575 D.C. No. CV-95-05314-SI **MEMORANDUM**[1] (Filed Dec. 4, 1998)

Appeal from the United States District Court
for the Northern District of California

Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted October 8, 1998
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

Terry Morgan appeals the district court's grant of summary judgment in favor of County of Lake (County) and the district court's denial of her Motion for Leave to File a Motion for Reconsideration. We have jurisdiction pursuant to 28 U.S.C. § 1291. The parties are familiar with the factual and procedural history of the case, therefore, we will not recount it here.

I.

Morgan contends that the district court misconstrued the applicable substantive law in determining whether she was an employee for the purposes of indemnification under California Government Code section 995 (the Torts Claims Act) and the California Labor Code section 2802. We review a grant of summary judgment *de novo*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), and we affirm.

Based upon the right to control test and the factors enumerated in the Second Restatement of Agency, we conclude that Morgan was not an employee because she retained the right to control the means and manner of accomplishing her assigned work. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 350, 769 P.2d 399, 404, 256 Cal. Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 949, 471 P.2d 975, 979, 88 Cal. Rptr. 175, 179 (1970). The fact that Morgan did not receive standard employment benefits from the County indicates that she was not intended to receive the benefit of indemnification. Moreover, the intent of the

County and Morgan was to create an independent contractor relationship. At the time of the underlying incident, Morgan and the County understood the relationship to be that of an independent contractor. Accordingly, we find that the district court correctly applied the substantive law in concluding that Morgan was an independent contractor.

II.

Morgan also contends that the district court erred in denying her motion for Leave to File a Motion for Reconsideration on the basis that two internal County memoranda were not discoverable until the district court ruled, subsequent to the summary judgment hearing, that the documents were not subject to the raised privileges. We review the district court's denial of leave to file a motion for reconsideration for an abuse of discretion, *School Dist. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1261 (9th Cir. 1993), and we affirm. We agree with the district court that the documents contained no factual or legal basis that would likely change the outcome of the case. Accordingly, we find that the district court did not abuse its discretion in denying Morgan's Motion for Leave to File a Motion for Reconsideration.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE P. POOLE; YOLANDA A. POOLE, Plaintiffs-Appellees, v. CARRIE TRITCHLER; KATHY WEHINGER, Defendants-Appellees, v. LAKE COUNTY; LAKE SUPERIOR COURT, Defendants-cross-defendants-Appellees, v. TERRY MORGAN, Defendant-cross-claimant-Appellant.	No. 97-16575 D.C. No. CV-95-05314-SI **ORDER** (Filed Jan. 13, 1999)

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

February 10, 1999

RE: Title: Poole v. Morgan
Appellate Number: 97-16575

Dear Counsel:

In response to your letter requesting publication of the memorandum decision in the above referenced case, the panel has asked me to advise you that they do not wish to publish the decision.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: /s/ Craig Westbrooke,
Craig Westbrooke
Deputy Clerk

cc: Brien J. Farrell
Nicolas L. Thakar
Michael D. Senneff
Marshall E. Bluestone
Steven C. Mitchell
Julie Collons Nelson
Nanette Joslyn
Henry F. Telfeian